

WHAT IF MARY SUE WANTED AN ABORTION INSTEAD? THE EFFECT OF *DAVIS v. DAVIS* ON ABORTION RIGHTS

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Scenario One: In Tennessee, Mr. Smith is upset.¹ He and his wife have been attempting for years to have a child. However, now that the advanced technology of "*in vitro* fertilization"² has provided seven frozen preembryos³ with which they may realize their parenting dream, their marriage is irreconcilable. After the divorce, Mr. Smith wants nothing to do with Mrs. Smith. He does not want children with her, and he abhors the idea of her having his biological children without him as the father figure. In short, Mr. Smith does not want the preembryos to be born. He would rather destroy them than become a father against his will.

How does Mr. Smith solve his problem? He sues Mrs. Smith for custody of the preembryos if she refuses to relinquish them. To bolster his argument, Mr. Smith will cite the Tennessee Supreme

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1. See *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *21 (Blount County Cir. Ct. Tenn. Sept. 21, 1989) (reciting the facts on which this hypothetical is based).

2. See Note, *Developments in the Law: Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1537-38, 1542 (1990) (citing ANDREA BONNICKSEN, *IN VITRO FERTILIZATION* 147-51 (1989)) ("*In vitro* fertilization involves removing a ripe egg from a woman's body and combining that egg with sperm in a petri dish. If fertilization occurs, the fertilized egg is permitted to divide until it is multicellular and is then implanted into a woman's womb . . . 'Frozen embryos' [are] fertilized but unimplanted human eggs.").

3. See *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *13 n.11 (Blount County Cir. Ct. Tenn. Sept. 21, 1989) (defining "preembryo" as a human entity that exists during a fourteen day period of development before the egg attaches to the uterine wall). Although no organs are developed and no cells are differentiated in a preembryo, genetics are "locked in" at fertilization. *Id.* at *13-14. For purposes of this note, the terms "preembryo" and "embryo" are used interchangeably. The difference between these two stages of development was a source of heated debate between experts at the trial court level of *Davis*, the subject of this article. *Id.* at *21. Ultimately, this difference was found to be irrelevant in deciding the issues of the case. *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992).

Court decision of *Davis v. Davis*,⁴ which supports his fundamental right not to procreate. If the court recognizes that Mr. Smith's right not to procreate outweighs Mrs. Smith's affirmative right to procreate, the preembryos will be destroyed.

Scenario Two: Only a few blocks from the Smith household, Mrs. Jones is fuming. She stares at a pregnancy test, considering her predicament: not only is she on the verge of a nasty divorce, but she is pregnant as well. Mrs. Jones is positive her husband is the father; she is also sure their marriage is doomed, due in part to his infidelity and violent inclinations. Knowing her husband as she does, Mrs. Jones is certain he will want to keep the child. She is equally certain that she will be the one faced with any resulting medical concerns, economic hardships, and loneliness. Mrs. Jones definitely does not want to have this child, whose father she considers a monster. She is also worried that it might end up with Mr. Jones and his future wife as custodial parents. In short, Mrs. Jones wants an abortion because she does not wish to procreate with Mr. Jones.

The solution to Mrs. Jones' dilemma is more complicated than the solution to Mr. Smith's dilemma. According to the Tennessee Criminal Abortion Statute, Mrs. Jones must have an abortion before the fetus becomes viable, preferably during the first three months of pregnancy.⁵ If she waits until the fetus becomes viable, her physician must certify in writing that an abortion is necessary to preserve her life or her health.⁶ Even if Mrs. Jones decides to have an abortion before the fetus reaches viability, she cannot do so immediately. She must first prove that she is a Tennessee resident.⁷ Second, she must arrange to have the abortion performed by a licensed physician.⁸ In addition, the physician may not perform the abortion until Mrs. Jones' "informed written consent" is obtained.⁹ Consent is "informed" only if Mrs. Jones listens to her doctor explicitly tell her the

4. *Davis*, 842 S.W.2d at 588.

5. TENN. CODE ANN. § 39-15-201(c)(1)-(2) (1991) (stating that it is not a crime to have an abortion during the first three months of pregnancy if the woman consents and her licensed physician concurs with her decision). The statute further states it is not a crime to have an abortion after the first three months of pregnancy if the fetus is not viable, the woman consents, and the procedure is performed in a licensed hospital by the woman's licensed physician. *Id.*

6. *Id.* § 39-15-201(c)(3) (requiring the physician to provide such certification to both the District Attorney General and the hospital wherein the abortion will be performed).

7. *Id.* § 39-15-201(d) (mandating proof of residency satisfactory to the performing physician).

8. TENN. CODE ANN. § 39-15-201(c)(1) (1991) (requiring a licensed physician to approve a woman's decision to abort during the first three months of pregnancy); see also *id.* § 63-6-201 (establishing general licensing requirements for Tennessee physicians).

9. *Id.* § 39-15-202(a) (requiring a woman's consent be "given freely and without coercion").

benefits and risks of abortion.¹⁰ The physician then explains the advantages and disadvantages of the procedure to the best of his or her ability, given the particular woman's circumstances.¹¹ After this consultation, Mrs. Jones must wait two days; on the third day following her physician's warnings, she is eligible to sign the consent form and have an abortion.¹²

A comparison of these two scenarios leads to the logical question: why would the law be so quick to recognize a man's right to refrain from procreation, but be so reluctant to recognize the same right for a woman contemplating abortion? This article explores the discrepancy, which becomes apparent when one reads *Davis v. Davis*¹³ together with the current leading abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁴ These two cases treat the fundamental right to privacy in significantly different ways.¹⁵ However, both cases present the same personal question: whether an individual has the freedom to make up his or her own mind about whether to have a child.¹⁶ After analyzing the fundamental right to procreational autonomy, the freedom of bodily integrity, and a woman's right to abortion, this article calls upon the U.S. Supreme Court to apply the

10. *Id.* § 39-15-202(b)(1)-(5) (asserting that "truly informed consent" occurs only after a woman listens to her doctor's oral recitation of the dangers associated with abortion).

11. *Id.* § 39-15-202(b)(6) (requiring the physician to address potential individual concerns related to childbirth and/or abortion).

12. TENN. CODE ANN. § 39-15-202(d)(1) (1991) ("There shall be a two (2) day waiting period after the physician provides the required information, excluding the day on which such information was given. On the third day following the day such information was given, the patient may return to the physician and sign a consent form.").

13. 842 S.W.2d 588 (Tenn. 1992).

14. 112 S. Ct. 2791 (1992). For further discussions concerning *Casey*'s impact on a woman's right to abort, see generally Jon D. Anderson, *Abortion: State Regulation—Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992), 76 MARQ. L. REV. 317 (1992) (setting forth *Casey*'s facts and procedural posture, evaluating each opinion in the case, and proposing alternative approaches the Supreme Court could have utilized); Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151 (1993) (suggesting that principles of state neutrality should be utilized to provide women greater constitutional protection in the post-*Casey* world); Paul B. Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993) (arguing that, realistically, *Casey* overruled *Roe v. Wade*).

15. *Compare Casey*, 112 S. Ct. at 2820 (holding that a woman's right to privacy and, by extension, her procreational autonomy as manifested in her right to obtain an abortion, is not fundamental and may be regulated so long as the regulations do not constitute an undue burden) with *Davis*, 842 S.W.2d at 603-04 (supporting the preembryos' parents' "right to sole decisional authority as to whether the process of attempting to gestate these preembryos should continue" and holding that where the parents' wishes conflict, "the party wishing to avoid procreation should prevail").

16. See *Casey*, 112 S. Ct. at 2804 (recognizing and reaffirming a woman's right to obtain an abortion before viability); *Davis*, 842 S.W.2d at 598 (asserting that the "essential dispute . . . is . . . whether the parties will become parents").

reasoning adopted by the Tennessee Supreme Court in *Davis v. Davis*¹⁷ to future abortion cases.

I. THE U.S. SUPREME COURT'S VIEWS ON PROCREATIVE LIBERTY

Though the word "privacy" does not appear expressly within its text, a citizen's right to privacy is nonetheless deeply rooted within those rights guaranteed by the *U.S. Constitution*.¹⁸ The Fourteenth Amendment prohibits states from enacting laws that "deprive any person of life, liberty, or property, without due process of law."¹⁹ The Due Process Clause protects not only those rights explicitly guaranteed by the *Constitution*, but also implied rights,²⁰ including an individual's right to privacy.²¹ The right to privacy is considered a necessary substantive extension of those liberty interests guaranteed by the Fourteenth Amendment's Due Process Clause,²² and encompasses both the affirmative right to procreate²³ and the right to prevent procreation.²⁴ "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁵ For pregnant women, abortion implicates not only procreational rights, but also rights accorded to bodily integrity, namely the right to be left alone. "No right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of

17. 842 S.W.2d 588 (Tenn. 1992).

18. See *Griswold v. Connecticut*, 381 U.S. 479, 482-84 (1965) (asserting that prior precedents recognize peripheral rights—"penumbras"—not mentioned specifically in the *Bill of Rights*, including the right to privacy). The Court in *Griswold* cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), among others, as supporting the legitimacy of peripheral rights. *Id.* at 482-83.

19. U.S. CONST. amend. XIV, § 1.

20. *Casey*, 112 S. Ct. at 2805 (quoting Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) as support for the proposition that liberty is not limited to the specific protections contained in the *Bill of Rights*); *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring) ("[Liberty] is not confined to the specific terms of the Bill of Rights.").

21. *Griswold*, 381 U.S. at 484-86 (describing the origins and controversies regarding the right to privacy).

22. *Id.* at 482-83 (asserting that the rights enumerated in the *Bill of Rights* would be less secure in the absence of "peripheral rights").

23. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty interest includes the right to raise children).

24. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) ("[T]he right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.").

25. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Skinner*, 316 U.S. at 535; *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)).

his own person, free from all restraint or interference of others²⁶

Decisions about procreation must be free from state intrusion because such decisions implicate fundamental rights.²⁷ States may not create obstacles designed to prohibit the exercise of fundamental rights.²⁸ Therefore, regulations that burden procreational decisions are subject to strict scrutiny by courts.²⁹ Such regulations can withstand strict scrutiny only if they exist for a "compelling state interest," and are "narrowly tailored" to achieve that interest.³⁰ In other words, regulations infringing upon fundamental rights, including the right to privacy, do not enjoy the same presumption of validity as laws that do not infringe on fundamental rights.³¹ The state "carr[ies] a heavy burden of justification" when courts subject statutes to strict scrutiny.³² The 1977 U.S. Supreme Court case of *Carey v. Population Services International* treated procreation as a fundamental right by applying strict scrutiny to regulations imposing burdens on procreational decisions.³³

Even U.S. Supreme Court Justice O'Connor, who has reluctantly recognized the right to privacy in abortion cases, admitted that

26. *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (denying that the circuit court had the power to order a personal injury plaintiff to submit to a surgical examination); *contra* *Sibbach v. Wilson*, 312 U.S. 1, 11 (1941) (holding that FED. R. Civ. P. 35, which empowers a court to order a party to submit to a mental or physical examination, is valid).

27. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977) (holding that access to contraceptives is an essential component of the right to make procreational decisions); *Eisenstadt*, 405 U.S. at 453 (stressing the importance of freedom from governmental regulations regarding decisions about parenthood); *Skinner*, 316 U.S. at 540 (noting the importance of marriage and procreation to the human race's survival); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 617-18 (1986) ("Protection against state intrusion afforded by the Constitution is especially strong where issues of childbearing are involved.").

28. Johnsen, *supra* note 27, at 617-18 (asserting that both direct state intrusion in or interference with personal decision-making autonomy are prohibited).

29. For a general description of strict scrutiny, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (evaluating a challenge to Texas' method of financing public education). The Court stated that "strict scrutiny means the state's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification' [.]". *Id.*

30. *Carey*, 431 U.S. at 688 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Eisenstadt*, 405 U.S. at 463).

31. *Rodriguez*, 411 U.S. at 16 (noting that Texas' system of financing public education was not likely to withstand strict judicial scrutiny).

32. *Id.*

33. 431 U.S. at 686 ("Where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.").

choices regarding procreation require sound constitutional protection against governmental imposition.³⁴ Justice O'Connor stated in *Casey*:

[These] matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.³⁵

Decisions regarding procreative liberty, abortion, and access to contraception should not be viewed as separate and distinct categories, but rather as three overlapping spheres. Access to each specific right is essential if the right to privacy in the larger sense is to be protected.³⁶

II. THE U.S. SUPREME COURT'S VIEWS ON ABORTION

The fundamental right to have an abortion evolves from the right to privacy, including: (1) the right to "personal autonomy and bodily integrity,"³⁷ and (2) the right to make one's own procreational choices.³⁸ In 1973, the much-heralded *Roe v. Wade* decision first established abortion as within the fundamental constitutional right to privacy.³⁹ As a result, the Supreme Court has not hesitated in the past to strike down statutes infringing upon women's access to abortion.⁴⁰ However, many fear that the more recent U.S. Supreme Court decisions in *Webster v. Reproductive Health Services*⁴¹ and *Casey*⁴²

34. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2807 (1992); see David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 *FORDHAM L. REV.* 895, 923 (1993) (citing *Casey* in support of the proposition that Justice O'Connor's approach to unenumerated fundamental rights yields politically conservative results).

35. *Casey*, 112 S. Ct. at 2807.

36. *Carey*, 431 U.S. at 688-89 (arguing that there is no constitutionally significant distinction between regulations severely inhibiting a woman's ability to obtain an abortion and regulations prohibiting abortion altogether).

37. *Casey*, 112 S. Ct. at 2810.

38. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942)).

39. *Id.* at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision . . .").

40. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 (1983) (striking down those statutory provisions mandating twenty-four hour waiting periods before abortions, informed consent, the requirement that second-trimester abortions be performed only in hospitals, and rules regarding disposal of fetal remains); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69, 75-79 (1976) (holding that the state may not constitutionally require spousal consent or prohibit the abortion method known as saline amniocentesis); *Doe v. Bolton*, 410 U.S. 179, 195-200 (1973) (striking down as "unduly restrictive" a statute requiring: (1) abortions be performed only at accredited hospitals; (2) approval of the abortion decision by an abortion committee and two other physicians; and (3) that the patient be a state resident).

41. 492 U.S. 490, 521 (1989) (narrowing and modifying *Roe*).

represent a deterioration of procreational autonomy. The court in *Davis* itself recognized that procreational protection by the courts "is no longer entirely clear."⁴³ Justice Blackmun best articulated this fear in his dissent to the *Webster* plurality: "[the plurality] turns a stone face to anyone in search of what [it] conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State."⁴⁴

Procreational autonomy indeed does not stand inviolate.⁴⁵ There are two ways in which the Supreme Court's abortion cases have deviated from the individual's fundamental right to make procreational decisions. First, most cases attempt to establish a point before which a woman may seek an abortion without fear of state regulation.⁴⁶ After that point, the right to abortion is not guaranteed.⁴⁷ Second, some cases distinguish themselves by the heightened weight given to states' interests in protecting both the woman's health and the potential life of the unborn.⁴⁸ Depending upon the interests articulated by the state, a court will apply either strict or intermediate scrutiny to determine the constitutionality of the regulations in question.⁴⁹ As a result, the right to have an abortion is never completely free from regulation of the abortion process.⁵⁰

42. 112 S. Ct. 2791, 2804, 2817, 2820 (1992) (reaffirming the central holding of *Roe* as being the woman's right to terminate her pregnancy before viability, yet upholding the state's right to regulate abortions even before viability).

43. 842 S.W.2d 588, 601 (Tenn. 1992) (citing Justice Blackmun's dissenting opinion in *Webster*).

44. 492 U.S. at 538 (Blackmun, J., dissenting).

45. See *Casey*, 112 S. Ct. at 2816-21 (discussing the appropriateness of state regulations limiting a woman's ability to exercise her right to an abortion); see also Kolbert & Gans, *supra* note 14, at 1151 (addressing the changing constitutional analyses applied to the right to privacy).

46. See *Casey*, 112 S. Ct. at 2821 (holding that a state may not prohibit abortion before viability but may do so after viability); see also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 433 (1983) (reaffirming *Roe*'s distinction between the first and second trimesters of pregnancy); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 61, 63-65 (1976) (reaffirming *Roe*'s trimester distinctions and extensively discussing viability).

47. *Casey*, 112 S. Ct. at 2821 (holding that abortion may be proscribed after viability).

48. See *Webster*, 492 U.S. at 519-20 (upholding the portion of a statute requiring viability testing prior to an abortion as furthering the state's interest in protecting potential human life); *Danforth*, 428 U.S. at 75-79 (reversing a lower court's holding that concern for maternal health justified prohibiting the saline amniocentesis abortion method).

49. Compare *Roe*, 410 U.S. at 155 (asserting that states must have compelling interests to justify laws infringing upon fundamental rights) with *Danforth*, 428 U.S. at 66 (articulating an intermediate standard of review by searching for a legitimate—as distinguished from a compelling—state interest to justify a consent requirement).

50. See *Casey*, 112 S. Ct. at 2816-21 (holding that abortion regulations which do not constitute an undue burden are constitutional).

The landmark case of *Roe v. Wade* fell short of recognizing a sweeping right to abortion for women desiring not to procreate.⁵¹ *Roe* held that the right to privacy encompasses a woman's decision whether to terminate her own pregnancy; however, this right can be restricted.⁵² It can be overcome by compelling state interests, such as protection of the mother's health or the potential unborn life.⁵³ The Court in *Roe* held that a woman's right to terminate her pregnancy in its early stages is constitutionally protected.⁵⁴ Justice Blackmun, writing for the majority in *Roe*, articulated a three-part holding based on a trimester approach to abortion regulation.⁵⁵ This holding purports to recognize a woman's fundamental right to have an abortion when not in conflict with a compelling state interest in protecting the fetus. First, before the fetus reaches viability, a woman may have an abortion unfettered by "undue interference" from the state.⁵⁶ During the first trimester, or before viability, the state's interests in protecting the mother's health and the potential life of the child by prohibiting abortion are insufficient to overcome the woman's fundamental right to an abortion.⁵⁷ Accordingly, the pregnant woman is free from state regulation when seeking an abortion during the first trimester of pregnancy.

The rest of *Roe*'s trimester framework does not grant pregnant women such liberties. In the second part of the holding, states are free to restrict access to abortion after the fetus has reached viability, as long as provisions allow an abortion when the woman's health is endangered.⁵⁸ In the third part, the Court recognizes the "important and legitimate" state interest in protecting the health of the woman and the potential life.⁵⁹

51. 410 U.S. at 154 ("The right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interests in regulation.").

52. *Id.* at 155 (agreeing with lower courts that the states' interests in protecting "health, medical standards, and prenatal life" may become more compelling than a woman's right to an abortion).

53. *Id.*

54. *Id.* at 160, 163 (asserting that viability of the fetus occurs at twenty-four to twenty-eight weeks and holding that the "State's important and legitimate interest in potential life" becomes compelling at viability). "[P]rior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.* at 163.

55. *Roe v. Wade*, 410 U.S. 113, 162-64 (1973).

56. *Id.* at 164.

57. *Id.* at 163-64 (holding that it is only after viability that the state's interest in the fetus justifies prohibiting abortion).

58. *Id.* ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

59. *Id.* at 162 ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and

These restrictions, which depend on a fetus' viability, reflect the trimester approach. During the first trimester of pregnancy, the woman is free from state regulation when seeking an abortion.⁶⁰ In the second trimester, the state's interest in providing for the health of the mother allows some regulation of abortion.⁶¹ In the third trimester, the fetus is viable, and thus the state's interest in the potential life of the fetus takes priority over the mother's privacy interest.⁶² "[T]he 'compelling' point is at viability."⁶³ Prohibitions on abortion during this final trimester are permissible in deference to the potential life.⁶⁴ In essence, the trimester approach enabled the Court to recognize a woman's right to abort without ignoring competing interests of the state.

In some respects, *Roe* represents a departure from privacy jurisprudence. For example, Justice Blackmun spoke not only of "compelling" government interests as necessary to justify abortion restrictions, but also of "important and legitimate" state interests.⁶⁵ This language suggests that although abortion is considered an important component of a woman's fundamental right to privacy, courts are not required to engage in strict scrutiny when reviewing a state law restricting abortion after fetal viability, because state interests are automatically compelling.⁶⁶ This lesser scrutiny indicates a departure from traditional fundamental rights jurisprudence, which typically employs strict scrutiny.⁶⁷

In 1992, the U.S. Supreme Court decided another landmark abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶⁸ *Casey* substantially changed the limits placed upon states in

legitimate interest in protecting the potentiality of human life.").

60. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

61. *Id.*

62. *Id.* (holding that the state may regulate abortion in promoting its interest in the potentiality of human life in the third trimester, except where abortion is necessary for the preservation of the mother's life or health).

63. *Id.* at 163.

64. *See id.* (holding that the state's important and legitimate interest in potential life becomes compelling after viability because the fetus is then capable of life outside the mother's womb).

65. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

66. *Id.* at 162-63.

67. *See Zablocki v. Redhail*, 434 U.S. 374 (1978) (applying strict scrutiny to the right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny to the fundamental right of interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (employing strict scrutiny to assess the constitutionality of a statute prohibiting interracial marriage); *Griswold v. Connecticut*, 381 U.S. 535 (1965) (applying strict scrutiny to the fundamental right of married persons to obtain contraception); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (applying strict scrutiny to compulsory sterilization of prisoners in light of its violation of the right to procreate).

68. 112 S. Ct. 2791, 2803, 2812, 2822, 2830 (1992) (writing for the Court, Justice O'Connor, joined by Justices Kennedy and Souter, reaffirmed *Roe's* central holding and upheld the statute's

regulating abortion.⁶⁹ Officially, while the Court did not overrule *Roe v. Wade*, its *Casey* decision greatly constricted *Roe*'s previous holding.⁷⁰ In fact, Justice O'Connor, writing for the majority, appeared reluctant even to recognize the precedential effect of *Roe*'s view on the state's interests in the potential life:

We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.⁷¹

As a result, commentators have since stated that access to abortion is no longer a fundamental right, and that a woman who seeks an abortion is unlikely to be guaranteed the same protections afforded other fundamental rights.⁷²

In *Casey*, the Court reviewed five provisions of a 1989 Pennsylvania abortion law.⁷³ These provisions were challenged by abortion clinics and physicians in a lawsuit seeking an injunction against the statute.⁷⁴ The provisions were as follows: (1) there existed only a narrow definition of "medical emergency" in which an abortion could be performed to preserve the health of the mother;⁷⁵ (2) the woman

medical emergency definition and invalidated its spousal notification provision). The plurality stood alone in its establishment of the "undue burden" test, its acceptance of viability as a constitutional marker, and its dismissal of the *Roe* trimester framework. *Id.* at 2817-19.

69. *Id.* at 2818 (rejecting the *Roe* trimester framework as a means of ensuring that a woman's right to choose is not subordinated by a potential life, and, instead, emphasizing the state's interest in assuring that a woman's choice to abort is thoughtful and informed).

70. *Id.* at 2821, 2823 (using strict scrutiny to overrule in part two abortion cases that struck down restrictive abortion laws). The two cases, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), invalidated ordinances requiring a woman to be provided with specific information before she could seek an abortion. The Court in *Casey* found that "[t]o the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires . . . the giving of truthful, non-misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases . . . are overruled." *Id.* (citations omitted).

71. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2817 (1992).

72. See Kolbert & Gans, *supra* note 14, at 1154 (discussing how the Court backed away from affording women the highest level of constitutional protection by using the undue burden test instead of strict scrutiny).

73. See *infra* notes 75-79 and accompanying text (discussing the five provisions).

74. *Casey*, 112 S. Ct. at 2796.

75. See *id.* at 2822 (affirming the definition of medical emergency as construed by the appellate court).

had to give her informed consent after a twenty-four hour waiting period prior to an abortion;⁷⁶ (3) married women were required to notify spouses of their intention to abort;⁷⁷ (4) minors had to gain parental consent prior to an abortion;⁷⁸ and (5) abortion clinics were held to stringent reporting and recordkeeping requirements.⁷⁹

Four of the limitations on abortion survived the Court's scrutiny. First, the medical emergency provision, which narrowly defined medical emergency, was not found to be an undue burden on the woman's right to choose.⁸⁰ Second, the Court supported the twenty-four hour waiting period requiring a woman to wait and receive information to ensure that her decision to abort be "informed."⁸¹ Third, the Court upheld the parental consent requirement.⁸² Finally, the recordkeeping and recording requirements, all of which make abortion more difficult,⁸³ survived intact. Only the spousal notification provision was considered a significant obstacle to obtaining an abortion.⁸⁴ The conclusion regarding this limitation

76. *Id.* (establishing that a doctor must inform the woman of her alternatives, as well as the procedures involved and the potential harmful effects of abortion, before her consent is considered "informed"); see also C. Elaine Howard, Note, *The Roe'd To Confusion: Planned Parenthood v. Casey*, 30 Hous. L. Rev. 1457, 1476 (1993) (recounting the judicial history of the informed consent doctrine and its original purpose).

77. See *Casey*, 112 S. Ct. at 2826-27.

78. *Id.* at 2832; see also Mary Edwards & Brian D. Lee, Note, *Constitutional Law—Abortion—A Regulation Requiring a Woman To Notify Her Husband Before Receiving An Abortion Is Impermissible Because It Unduly Burdens the Woman's Abortion Right—Planned Parenthood v. Casey*, 23 SETON HALL L. REV. 255, 289 (1992) (reviewing the court of appeal's reasoning that a judicial bypass option to the parental consent provision would cure any undue burden parental consent would put on a minor seeking an abortion; the Supreme Court validated this reasoning).

79. See *Casey*, 112 S. Ct. at 2832 (reviewing the reporting and recordkeeping requirements, which included filing the names and addresses of every facility which performs abortions, as well as identifying information for each party involved in an abortion).

80. See *id.* at 2822 (summarizing the court of appeal's interpretation of the Pennsylvania statute defining medical emergency). Even though there was some possibility that the statutory definition of medical emergency was too narrow, the appellate court interpreted the statute as "not in any way pos[ing] a significant threat to the life or health of a woman." *Id.* The Supreme Court deferred to this construction of the statute. *Id.*

81. See *id.* at 2826 (stressing the importance of informed consent because it facilitates making a wise decision).

82. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2832 (1992) (noting that requiring informed parental consent before a minor may seek an abortion will allow parents or guardians the opportunity to consult privately with their daughter to discuss the consequences of her decision).

83. See *id.* at 2832-33 (listing the recordkeeping and recording requirements of the statute). For example, the district court found that "many physicians, particularly those that previously discontinued performing abortions because of harassment, will refuse to refer patients to abortion clinics if their names will appear on these reports. This would result in the imposition of an undue burden on the woman's ability to obtain an abortion." *Planned Parenthood of Southeastern Pa. v. Casey*, 744 F. Supp. 1323, 1392 (E.D. Pa. 1990).

84. See *Casey*, 112 S. Ct. at 2826-33 (discussing the testimony heard by the district court regarding the dangers of forcing a battered woman to notify her husband before obtaining an abortion).

was reached only after extensive consideration of the potential impact of domestic violence on married women's choices.⁸⁵

In the written analysis, Justice O'Connor meticulously analyzed the problems of *Roe* and concluded that its holding had not proven unworkable.⁸⁶ The majority did not disturb *Roe's* categorization of state interests using viability as a marker for the boundaries of state interference, even though advanced medical technology in the 1990s has moved this viability marker safely to either earlier or later in the pregnancy.⁸⁷ However, *Casey* rejected *Roe's* trimester approach as too rigid.⁸⁸ Instead, a new holding employing an "undue burden" test was adopted providing that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."⁸⁹ In other words, state regulations that discourage abortion, by making it inconvenient, expensive, or complex, are permitted, as long as they are not "a substantial obstacle to the woman's exercise of the right to choose."⁹⁰ In addition, these regulations are considered a reasonable burden on aborting a nonviable fetus; abortion of a viable fetus is still within the province of the states to prohibit entirely.⁹¹

Casey's new undue burden test has the effect of affording more deference toward the state's interest in protecting a potential life. "Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted"⁹² The leading indicator of this newfound deference is the level of

85. See *id.* at 2830 (finding that the mother's liberty interest weighs more heavily than the father's because "the state has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman"); see also *The Supreme Court, 1991 Term-Leading Cases*, 106 HARV. L. REV. 201, 206-07 (1992) (discussing the Court's recognition of domestic violence as a reason for striking down the spousal notification requirement; also highlighting the tragic failure of the Court to accord the same protection for pregnant adolescent victims of family violence as it does to adult victims of domestic violence in its decision not to invalidate the parental notification requirement). For a further discussion of the Court's invalidation of the spousal notification requirement, see Anderson, *supra* note 14, at 328.

86. See *Casey*, 112 S. Ct. at 2809-12.

87. See *id.* at 2816-17 (commenting that although there may be medical developments that affect the precise point of viability, "this is an imprecision within tolerable limits").

88. *Id.* at 2818; see also *The Supreme Court, 1991 Term-Leading Cases*, *supra* note 85, at 203-04 (discussing the rejection of *Roe's* trimester framework and the application of the undue burden test, rather than strict scrutiny review).

89. *Casey*, 112 S. Ct. at 2821.

90. *Id.* ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from [the state] in doing so.").

91. See *id.* (reaffirming *Roe's* holding that the state may proscribe abortion after viability).

92. *Id.* (maintaining that state measures designed to persuade a woman to choose childbirth over abortion will be upheld as long as no undue burden results).

scrutiny applied by the Court in *Casey*.⁹³ The state's interest in potential life is deemed a "substantial" interest, and if abortion restrictions are "reasonably related" to that legitimate end, they will be upheld.⁹⁴ Gone is the application of strict scrutiny, an application regularly reserved for those rights labelled "fundamental," including the right to privacy and matters of procreation.⁹⁵

The Court in *Casey* attempted to lessen the importance of the rights conferred by *Roe* by making it easier for the state to trump those rights.⁹⁶ The majority conceded that while *Roe* properly reveres the woman's liberty interest in recognition of the *Griswold* string of cases,⁹⁷ the Court hinted that the state interest in fetal protection actually may be a compelling one, enough to override the woman's liberty interest when faced with tough state abortion laws.⁹⁸

[I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.⁹⁹

Casey breathes new life into *Roe*'s language of "important and legitimate" state interests, as compared to compelling state interests that would have been required under a strict scrutiny analysis.¹⁰⁰ *Casey*'s holding clearly establishes the lesser scrutiny under which states may place greater weight on the interests of a woman's health

93. See *id.* at 2820 (discussing the Court's use of the undue burden standard rather than strict scrutiny).

94. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2821 (1992); see also text accompanying note 72 (discussing the impact of the diminished constitutional protection for women seeking abortions as evidenced by the partial overruling of recent decisions where strict scrutiny had been used to bar state-mandated information and twenty-four hour mandatory delays).

95. *Casey*, 112 S. Ct. at 2804-08; see also *supra* part I (discussing the Supreme Court's historical treatment of these rights).

96. *Casey*, 112 S. Ct. at 2817; see also *supra* notes 88-95 and accompanying text.

97. *Casey*, 112 S. Ct. at 2810.

98. *Id.* at 2817. In *Webster*, a case that appeared after *Roe* but before *Casey*, the Supreme Court suggested that a compelling interest in protecting potential life may exist even before viability. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989) (pointing out that there does not have to be a rigid line only at the point of viability, and citing from the dissenters in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986), that "the State's interest, if compelling after viability, is equally compelling before viability").

99. *Casey*, 112 S. Ct. at 2816.

100. See *supra* notes 29-30 and accompanying text.

and the potential life of the child, than that accorded to the woman's right to privacy.¹⁰¹

The question arises: what is the difference between procreative liberty and the right to an abortion? Is not a decision to abort the ultimate decision regarding procreation? Why are the doctrinal categories of *Casey* and *Roe* judged to be different? Justice O'Connor sees *Roe* as the "intersection of two lines of decisions."¹⁰² One line includes cases such as *Griswold*, which afford substantial freedoms to individuals regarding decisions about intimate relationships.¹⁰³ The other line is exemplified by cases such as *Cruzan v. Director, Missouri Department of Health*,¹⁰⁴ which limit the state's power—out of respect for bodily integrity—to either require or deny certain medical treatment to individuals.¹⁰⁵ The Supreme Court has recognized further that *Roe* and its progeny are in a class by themselves. While the importance of the woman's liberty interest cannot be diminished easily, error might be found in the alleged magnitude of the state's interest in fetal protection. Because *Roe* is factually concerned with post-conception decisions, it stands apart from other liberty cases that do not involve the post-conception potential for life.¹⁰⁶ Some scholars have suggested that "[a]t the core of this sphere is the right of the individual to make for himself [or herself] . . . fundamental decisions that shape family life: whom to marry; whether and when

101. See *Casey*, 112 S. Ct. at 2818 (describing the important and legitimate right of the state to enact rules and regulations designed to encourage women to continue their pregnancies).

102. *Id.* at 2810.

103. See *supra* notes 18-23 and accompanying text (outlining the judicial history of this line of cases).

104. 497 U.S. 261 (1990) (requiring a showing by clear and convincing evidence that a patient in a persistent vegetative state wishes life-sustaining treatment to be ceased); see also *Riggins v. Nevada*, 112 S. Ct. 1810 (1992) (holding that it is unconstitutional to administer anti-psychotic drugs to a mentally ill prisoner against his will during the course of his trial, without "findings that there were no less intrusive alternatives, that the medication was medically appropriate, and that it was essential for the sake of defendant's safety or the safety of others"); *Washington v. Harper*, 494 U.S. 210 (1990) (holding that a mentally ill state prisoner could be treated with anti-psychotic drugs against his will if the prisoner was found to be dangerous and treatment was in the prisoner's medical interest); *Rochin v. California*, 342 U.S. 165 (1952) (finding that forcing an emetic into a defendant's stomach against his will in order to get him to vomit two capsules of morphine violated the Due Process Clause of the Fourteenth Amendment); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that a Massachusetts' regulation requiring all citizens to be vaccinated did not violate the *Constitution* when the vaccinations were "deemed necessary for public health and safety").

105. See *Casey*, 112 S. Ct. at 2810 (discussing *Roe* "not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection").

106. See *id.*

to have children; and with what values to rear those children."¹⁰⁷ Clearly, the right to an abortion—a fundamental decision affecting family life—falls within this class of interests. "The question of constitutionality [in *Roe*] is a more difficult one than that involved in *Griswold* and *Eisenstadt* only because the asserted state interest is more important, *not because of any difference in the individual interests involved*."¹⁰⁸

The Supreme Court appears to have lost sight of the fact that the rights to abortion and contraception stem from the same underlying right to privacy, which is fundamental and sacred in U.S. jurisprudence. There is no real difference between the two types of cases regarding the degree of privacy that must be afforded women.

III. THE TENNESSEE SUPREME COURT'S VIEWS ON THE RIGHT TO REFRAIN FROM PROCREATION

A. *The Frozen Preembryos*

The facts of *Davis* are terribly cruel.¹⁰⁹ Thirty-year old Junior Lewis Davis¹¹⁰ and his wife, twenty-eight-year old Mary Sue Davis,¹¹¹ repeatedly attempted to conceive a child, but were unsuccessful.¹¹² During the first four years of their marriage, the Davises suffered the pain and disappointment of five tubal pregnancies.¹¹³ Finally, in 1985, the Davises attempted more drastic measures; they entered an

107. Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765, 772 (1973); see also *Casey*, 112 S. Ct. at 2810 (stating that subsequent constitutional developments after *Roe* have not disturbed "the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child").

108. Heymann & Barzelay, *supra* note 107, at 772 (emphasis added).

109. See Ronald Smothers, *Court Gives Ex-Husband Rights on Use of Embryos*, N.Y. TIMES, June 2, 1992, at A1 (summarizing the ruling in *Davis* and quoting Arthur L. Caplan, Director of the Center for Biomedical Ethics at the University of Minnesota, who indicated that the holding of *Davis* is even more cruel to Mrs. Davis, in that it belittles her affirmative right to procreate). See generally Kimberly H. Harris, Comment, *Family Law—Davis v. Davis: A Step Back for the Right to Procreate*, 23 MEM. ST. U. L. REV. 399, 405 (1993) (analyzing the right to avoid procreation as decided by the Tennessee Supreme Court).

This author is aware that Mrs. Davis Stowe (formerly Mary Sue Davis, see *infra* note 111) is extremely distraught at the court's decision in *Davis*, and intends no disrespect by supporting the case's outcome. The law too often overlooks the feelings of those whose lives it impacts, but in a situation as heart-breaking as the instant case, Mrs. Davis Stowe's intense pain and hardship should not be brushed aside. The author hopes that Mrs. Davis Stowe may someday realize her significant contribution to women's rights.

110. *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *55 (Blount County Cir. Ct. Tenn. Sept. 21, 1989).

111. *Id.* at *72. Mary Sue Davis eventually remarried and took the last name of Stowe. This article will refer to her as "Mrs. Davis" for the historical portion of the article, and "Mrs. Davis Stowe" for the remainder.

112. See *id.* at *73-74.

113. *Id.* at *73.

"*in vitro* fertilization" [hereinafter "IVF"] program.¹¹⁴ During the program, Mrs. Davis was subjected to numerous drugs, injections, and surgical procedures, often resulting in anxiety and disappointment.¹¹⁵ Initial attempts at IVF failed.¹¹⁶ The Davises then attempted adoption;¹¹⁷ however, the mother of the child the Davises were to adopt decided, at the last minute, to keep her child.¹¹⁸ The Davises returned to the IVF program in the fall of 1988, eager to try a new cryopreservation program.¹¹⁹ In this procedure, nine ova were removed from Mrs. Davis and then inseminated in the laboratory by Mr. Davis' sperm.¹²⁰ Two fertilized ova were implanted (unsuccessfully) in Mrs. Davis' womb, and the other seven were frozen in order to be preserved for future use.¹²¹

B. *The Divorce*

Unfortunately, and undoubtedly due in part to their continued inability to conceive, the Davis' relationship deteriorated. They divorced after nine years of marriage.¹²² The single issue litigated in the separation pertained to the seven frozen preembryos.¹²³ Questions arose as to who would have custody of the fertilized ova, and what could be done with them.¹²⁴

Mrs. Davis' argument was that the seven preembryos were life, and with implantation, she would be able to have children in the

114. *Id.*

115. See *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *73-74 (Blount County Cir. Ct. Tenn. Sept. 21, 1989) (listing the procedures Mrs. Davis had to go through including "six IVF attempts, [where] no cryopreservation procedures were employed; each implantation was the culmination of weeks of preparation—drugs to stimulate her reproductive system . . . insemination *in vitro*, anxious hours of waiting to confirm fertilization, implantation—then additional weeks of waiting to determine if an *in utero* pregnancy had occurred").

116. See *id.* (describing the self-injections Mrs. Davis had to administer as well as various other preparation procedures she had to go through before surgery and insemination).

117. See *id.* at *56 (recounting how the Davises paid the medical expenses of a Kentucky girl who offered her child for adoption, but subsequently decided to keep it).

118. *Id.*

119. See *id.* at *6 n.3, *56 (defining "cryopreservation" as a procedure by which cells are frozen in a laboratory using liquid nitrogen, then later thawed for use).

120. *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *6 nn.1, 4 & 6, *57 (Blount County Cir. Ct. Tenn. Sept. 21, 1989) (defining "ova" as unfertilized human eggs and "insemination" as the placing together of the sperm and the ovum).

121. See *id.* at *6-15 nn.3, 4, 6, 10 & 20 (defining terms used in IVF).

122. *Id.* at *4.

123. *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992); see also *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *8 n.10, *18 (Blount County Cir. Ct. Tenn. Sept. 21, 1989) (defining "embryo" as "a beginning or undeveloped stage of anything" and "preembryo" as a product of gametic union that lasts from fertilization for up to fourteen days).

124. *Davis*, 842 S.W.2d at 589 (describing how the Davises were able to agree on all aspects of their separation, except for who was to have custody of the seven frozen preembryos).

future.¹²⁵ She testified about a motherly attachment to the embryos, and about her desire to give birth to them—even as a single parent.¹²⁶ However, when the case ultimately reached the Tennessee Supreme Court, Mrs. Davis had remarried and wished at that point to donate the embryos to another couple, instead of implanting them in herself.¹²⁷ In spite of her change of heart about what to do with the preembryos, Mrs. Davis continued throughout the entire litigation to consider the embryos “potential life.”¹²⁸

Mr. Davis initially preferred to keep the preembryos frozen until he could make a final, thoughtful decision about them.¹²⁹ He wanted either joint custody of the preembryos, or, as a last resort, to have them available for implantation exclusively by Mrs. Davis; he emphatically did not want them donated to another infertile couple.¹³⁰ His testimony at trial was summed up in the appendix of the trial court’s opinion:

Mr. Davis opposes Mrs. Davis’ use of the embryos because he does not want to be ‘ . . . raped of [his] reproductive rights . . . ’; he maintains her use without his consent forces *unwanted parenthood* on him, a situation which disturbs him greatly. He doesn’t want a child produced to live in a single-parent situation.¹³¹

While Mr. Davis maintained during the trial that he preferred not to have the embryos destroyed,¹³² he ultimately conceded he would rather see them destroyed than donated to another couple.¹³³ By the time the case reached the Tennessee Supreme Court, Mr. Davis was “adamantly opposed” to a donation and freely admitted that he would have the preembryos destroyed if given that option.¹³⁴

125. Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641, at *74 (Blount County Cir. Ct. Tenn. Sept. 21, 1989).

126. *Id.*

127. See Davis, 842 S.W.2d at 590, 604 (discussing Mrs. Davis’ desire to donate the preembryos to another couple and her concern that the procedures she underwent would have been useless if the preembryos were destroyed).

128. See *id.* at 594 (explaining the trial judge’s agreement with Mrs. Davis’ belief and his reasoning that, because it was “in the best interest of the children” to be born, rather than destroyed, Mrs. Davis should be awarded custody of the “children *in vitro*” because she was ready to provide them with this opportunity).

129. Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641, at *58 (Blount County Cir. Ct. Tenn. Sept. 21, 1989).

130. *Id.*

131. *Id.* at *59 (emphasis added).

132. *Id.* at *58 (requesting the court to award joint custody of the embryos, prohibit their use until he could decide an appropriate course of action, or consider only Mrs. Davis for implantation).

133. *Id.*

134. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

Four experts on embryonic development and the law testified at the *Davis* trial.¹³⁵ These experts testified as to their understandings of a human preembryo, the development of a human child, the history of *in vitro* fertilization, and the process of cryopreservation of human cells.¹³⁶ Description of such scientific detail is beyond the scope of this article; therefore, suffice it to state that out of all the experts, only one, Dr. Lejeune, believed that life begins at conception and that the seven fertilized ova were "tiny persons."¹³⁷

C. *The Tennessee Lower Courts' Decisions*

The presiding judge in the case, W. Dale Young of the Blount County Circuit Court in Tennessee, apparently followed the analysis of Dr. Lejeune. He not only granted custody of the embryos to Mrs. Davis for implantation,¹³⁸ but also held that life begins at conception.¹³⁹ The judge did not simply make findings on custody, but, without precedent, found that embryos are human beings with legal rights, even before they are attached to the uterine wall.¹⁴⁰ On appeal, Mr. Davis argued that the trial court denied him his "right to control reproduction," as Mrs. Davis would have full control over the embryos for implantation.¹⁴¹ Thus, Mr. Davis could be forced to "become a parent against his will."¹⁴² The Tennessee Court of Appeals, applying strict scrutiny, found no compelling state interest and reversed the trial court.¹⁴³ The appeals court decreed that the

135. *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *61-71, *76-84 (Blount County Cir. Ct. Tenn. Sept. 21, 1989) (providing a detailed account of the scientific testimony presented at trial by the four experts: John Robertson, a legal scholar; Dr. King, the Davis' gynecologist who performed the IVF procedures; Dr. Charles Shivers, a scientist devoted to the study of embryological development; and Dr. Jerome Lejeune, a French geneticist).

136. *Id.*

137. *Davis*, 842 S.W.2d at 593. For a scathing review of Dr. Lejeune's testimony, see generally George J. Annas, *A French Homunculus in a Tennessee Court*, 19 HASTINGS CENTER REP. 20 (1989) (outlining the highlights of Dr. Lejeune's testimony, including his statement that a chicken egg, which Mr. Davis' lawyer held up for him to identify, was an egg, and the lawyer's response: "I thought you would have told me that it was an early chicken.").

138. *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *37 (Blount County Cir. Ct. Tenn. Sept. 21, 1989).

139. *Id.* at *30-31 (holding that the case's record supported the conclusion that life begins at conception, and that the preembryos were human beings).

140. *Id.* at *30-35 (determining that no Tennessee public policy existed which prevents development of the common law regarding embryos, and concluding they should be considered human beings with legal rights). The court cited, as its authority, the common law doctrine of *parens patriae*—"the power of the sovereign to watch over the interests of those who are incapable of protecting themselves." *Id.* at *34-35 (citing *In re: Baby M*, 537 A.2d 1227 (N.J. 1988)).

141. *Davis v. Davis*, C/A No. 180, 1990 Tenn. App. LEXIS 642, at *5 (Tenn. Ct. App. Sept. 13, 1990).

142. *Id.*

143. *Id.* at *11.

parties would have joint custody of the embryos, because: "[i]t would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant to order Junior to bear the psychological, if not the legal, consequences of paternity against his will."¹⁴⁴

D. *The Tennessee Supreme Court's Holding*

The Tennessee Supreme Court granted review in the case even though it agreed with the appellate court's constitutional analysis.¹⁴⁵ The court wished to clarify the law in an area that had yet to be charted, and to review the case in light of the changed legal positions of Junior Davis and Mary Sue Davis, both of whom had remarried.¹⁴⁶

In order to make its ruling, the court in *Davis* relied on the right to privacy, especially the right to procreational autonomy established by the *Griswold* line of cases.¹⁴⁷ The court's interpretation indicates that whether someone will become a parent rests on his or her constitutional right to privacy.¹⁴⁸ In the IVF process, even though the woman is affected more severely than the man, the court held that each potential parent "must be seen as entirely equivalent gamete-providers."¹⁴⁹ Preembryos were not found to be persons or property, but a special category deserving of respect for their "potential for human life."¹⁵⁰ Because both Mr. Davis and Mrs. Davis Stowe had rights of equal status, the court balanced those rights and determined that Mr. Davis' right to refrain from procreation outweighed Mrs. Davis Stowe's right to procreate.¹⁵¹

Unlike the abortion cases, the state's interest in protecting potential life in *Davis* did not rise to a level of importance necessary to

144. *Id.* at *8-9.

145. *Davis v. Davis*, 842 S.W.2d 588, 598 (Tenn. 1992).

146. *See id.* at 590 (stating that review was granted "because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies, and because the Court of Appeals d[id] not give adequate guidance to the trial court in the event the parties cannot agree").

147. *See id.* at 598-601; *see also supra* part I.

148. *See Davis*, 842 S.W.2d at 600 (holding that "in terms of the Tennessee state constitution, the right of procreation is a vital part of an individual's right to privacy"). Moreover, the court stated that, "whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation." *Id.* at 601.

149. *See id.* (explaining that a "gamete" is a mature sex cell that can unite with another sex cell to form a new animal).

150. *Id.* at 597.

151. *Id.* at 603 (observing how a decision "which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences"); *see also infra* notes 158-59 and accompanying text.

withstand the court's scrutiny.¹⁵² Four reasons were indicated for this occurrence. First, the court cited *Roe* and *Webster* to claim that because the state interest of protecting potential life does not become compelling until after viability, certainly it would not be compelling at a developmental stage far in advance of viability.¹⁵³ Second, Tennessee public policy states that "persons born alive" enjoy a higher status than do the unborn.¹⁵⁴ Third, no such state interest is articulated in Tennessee's abortion statute.¹⁵⁵ Fourth, no interest is sufficient to outweigh the gamete-providers' procreational choices because, even if another person were to gestate these preembryos, Junior and Mary Sue Davis would still be parents, at least in the genetic sense.¹⁵⁶ After balancing the interests of both parties, the court held that the party wishing to avoid procreation, Mr. Davis, prevailed, and that the preembryos could be destroyed.¹⁵⁷ The court noted that, although Mrs. Davis would suffer an emotional burden in knowing that the IVF procedures she underwent would never result in the creation of children, Mr. Davis had a more significant interest in avoiding parenthood.¹⁵⁸ The court reasoned that donation of the preembryos would rob him of his "procreational

152. *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (noting that the state's interest in the potential life of the preembryos was not sufficient to limit the freedom of the parties to decide whether or not they wished to become parents).

153. *See id.* at 595.

154. *See id.* at 601 (explaining that Tennessee's abortion statutes reflect "a policy decision to recognize that persons born alive or capable of sustaining life *ex utero* have a higher status than do fetuses *in utero*").

155. *See id.* at 602 n.26 (noting the absence of an express state interest at this developmental stage indicated that, at least in some instances, "the interest of living individuals in avoiding procreation is sufficient to justify taking steps to terminate the procreational process, despite the state's interest in potential life").

156. *Id.* at 602.

157. *Davis v. Davis*, 842 S.W.2d 588, 604-05 (Tenn. 1992). Had the facts been slightly different, the *Davis* decision may have yielded different results. First, the Davises made no agreement or contract as to the disposition of unused embryos when they entered the IVF program. *Id.* at 592. If a written agreement had existed, the court merely would have upheld the agreement, barring any unconscionability, and the case would never have reached the Tennessee Supreme Court. *Id.* at 597-98. Second, no Tennessee statute governed the disposition of unused products of IVF. *Id.* at 596. Third, no case law existed to guide the court, except for: *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (assuming, but not deciding, frozen preembryos are "property," and that the IVF institute must return the plaintiffs' frozen embryo as part of a bailment relationship); *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588 (S.D.N.Y. Apr. 13, 1978) (LEXIS, Genfed library, Dist file) (awarding damages to a woman whose IVF embryos preserved in a petri dish were destroyed deliberately by a doctor); and an Australian IVF case involving a California couple who died intestate in a plane crash and whose frozen embryos were left out of the distribution of the estate. *See George P. Smith, Australia's Frozen "Orphan" Embryos*, 24 J. FAM. L. 27 (1985-86) (describing this case and noting the need for legislative regulation of IVF procedures in both Australia and the United States).

158. *Davis*, 842 S.W.2d at 604.

autonomy," and of an opportunity to have a relationship with his offspring, if a child were born.¹⁵⁹

Ultimately, in February, 1993, the U.S. Supreme Court denied certiorari to review the *Davis* case at the request of Mrs. Davis Stowe.¹⁶⁰ Without commenting on their reasons for declining to hear the case, the Justices let stand the holding of an individual's right to prevent procreation.¹⁶¹ In June, 1993, five years after the beginning of the painful struggle, Mr. Davis ordered the frozen embryos destroyed.¹⁶²

IV. WHY THE U.S. SUPREME COURT SHOULD RECOGNIZE THE FUNDAMENTAL RIGHT NOT TO PROCREATE FOR WOMEN AS WELL AS MEN, IN THE TRADITION OF *DAVIS V. DAVIS*

*There is something just a touch spooky here. As women's reproductive rights are contracting, men's rights seem to be expanding.*¹⁶³

The U.S. Supreme Court should adopt the reasoning involved in *Davis* when deciding the abortion issue, and stop judicially regulating women's bodies. Pro-choice advocates welcomed the *Davis* decision because of its recognition of the right to refrain from procreation.¹⁶⁴ "Had the Justices accepted the arguments [of] Mrs. Davis Stowe's lawyers—that human life begins at conception—the right to reproductive privacy for all women [w]ould have been a dead letter."¹⁶⁵

If a pregnant woman can be guaranteed the freedom to choose whether to have a child without the interference of courts or legislatures at the beginning of the child-bearing process, then the

159. *Id.*

160. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993). *See generally Supreme Court: Justices Refuse to Hear Frozen Embryo Case*, ABORTION REP., Feb. 23, 1993, at 52 (noting that *Davis* had drawn interest from pro-choice activists and their opponents because of the trial court's ruling that preembryos were constitutionally protected human beings); Joan Biskupic, *High Court Won't Hear Embryo Case, Woman Had Sought Control After Divorce*, WASH. POST, Feb. 23, 1993, at A5 (chronicling the Supreme Court's refusal to challenge the Tennessee Supreme Court's decision that Mr. Davis' right not to procreate was the overriding privacy interest in the case).

161. Biskupic, *supra* note 160, at A5.

162. *See generally Seven Embryos in Custody Case are Destroyed*, N.Y. TIMES, June 16, 1993, at A18.

163. *See* Ellen Goodman, *Between Two Procreational Rights*, BOSTON GLOBE, June 4, 1992, at Op-Ed 19 (commenting on the constriction of women's rights regarding procreation after *Casey*).

164. *See* Helene Cooper, *Court Denies Mother's Bid for 7 Embryos*, WALL ST. J., June 2, 1992, at B9 (reporting that "[a]bortion rights activists called the decision a needed boost at a time when abortion rights have come increasingly under fire from the U.S. Supreme Court"). *But see* Smothers, *supra* note 109, at A16 (quoting the Executive Director of the National Right to Life Committee in Washington, D.C., as saying: "[t]he most frightening aspect of this is the court has decided that whatever party is seeking to destroy the unborn child prevails.").

165. Biskupic, *supra* note 160, at A5.

opposition to the freedom of choice movement will be largely preempted. In *Casey*, Justice O'Connor called abortion a "unique act," due to its implications not only for the mother, but also for her family, spouse, doctors, and the allegedly potential life that is destroyed.¹⁶⁶ This poignant observation did not stop the Tennessee Supreme Court from allowing Mr. Davis to dispose of seven preembryos, each of which had been held to represent a potential human life.¹⁶⁷ Mr. Davis' personal decision to destroy the preembryos had no less an effect on his family, his ex-wife, and society than would a decision by Mrs. Davis Stowe to have an abortion.

A. *Legal Status of the Unborn*

A key question arises: can the decision in *Davis* apply to all abortion decisions during all stages of fetal development, or is the difference between status as a preembryo, as compared to that of a fetus, too great in the eyes of the law?¹⁶⁸ The answer to this question is overwhelmingly burdensome. It is the fundamental question of "when does life begin?" What is important for the courts to recognize is that this question provokes different answers in different spheres: legal, medical, economic, religious, social, and moral. The law must address only the legal answer to this question, and allow the individual to arrive at his or her own moral solutions.¹⁶⁹ Justice O'Connor addressed this reality in her plurality opinion in *Casey*:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.¹⁷⁰

166. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2807 (1992).

167. *Davis v. Davis*, 842 S.W.2d 588, 594-97 (Tenn. 1992) (observing that the critical point of viability is a stage in fetal development far removed from that of the four- to eight-cell preembryos in the case).

168. Statutory fetal rights continually spring up all over the country. Johnsen, *supra* note 27, at 604-05. States burden pregnant women with a slew of regulations: from deciding to take the fetus away from the mother *before it is born* if she endangers its health, to seizing custody of fetuses in order to compel women against their wishes to undergo caesarean section deliveries. *Id.*

169. Bluntly criticizing the *Davis* trial judge for both overstepping his bounds as a judge and forcing his own moral values on the parties, commentator George J. Annas stated that *Davis* "provides a powerful example of what can go wrong when a trial court judge takes it upon himself to 'solve' major bioethical issues." Annas, *supra* note 137, at 20.

170. *Casey*, 112 S. Ct. at 2806.

Declaring that life begins at conception is not only a scientifically "egregious oversimplification,"¹⁷¹ but is also a conclusion not shared by the Supreme Court in its abortion cases' analysis, or by the court in *Davis*.¹⁷² Scientifically and socially, birth is the landmark event that gives a human its status: birth is the important event for parents; it exposes the baby to a radically different environment than that experienced in the uterus; and it is at this point that the baby begins direct interaction with others in a social setting.¹⁷³ Further, the law recognizes human life as beginning at birth, the point at which a person earns legal status, and neither embryos nor fetuses are considered legal persons with rights.¹⁷⁴ A person is not protected by the U.S. or any state constitution until birth, and no Supreme Court Justice has suggested a holding to the contrary.¹⁷⁵ Under the

171. See CLIFFORD GROBSTEIN, *SCIENCE AND THE UNBORN* 23-24 (1988) (indicating that "one must look more deeply into what fertilization or conception actually signifies with respect to individuality").

172. The Tennessee Court of Appeals overruled the trial judge's finding that "life begins at conception" and the Tennessee Supreme Court likewise held that preembryos represent only the "potential for human life." *Davis v. Davis*, 842 S.W.2d 588, 594-97 (Tenn. 1992).

173. GROBSTEIN, *supra* note 171, at 121-22 (noting that birth is a landmark event in human life history as it "thrusts the infant into a fundamentally new physiological and social existence that influences all that follows").

174. See Bill E. Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131 (1993) (discussing the lack of positive law concerning the legal status of the embryo); Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305 (1993) (maintaining that only the state of Louisiana recognizes embryos to have legal rights) (citing LA. REV. STAT. ANN. §§ 9:121-33 (West 1991)); Susan Goldberg, *Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503 (1991) (arguing that courts should not give fetuses the legal status of persons); Barbara Gregoratos, *Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization*, 37 HASTINGS L.J. 977 (1986) (asserting the legal status of the embryo is undefined and legal protections of the fetus are contingent upon live birth or viability); Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463 (1992) (arguing that there are compelling reasons accepted worldwide for not viewing an embryo as a person); John A. Robertson, *Resolving Disputes Over Frozen Embryos*, 19 HASTINGS CENTER REP. 7 (1989) (contending that preembryos and fetuses should not be treated as persons because they are not developmentally complete entities and may never realize their potential for personhood); Michelle F. Sublett, *Frozen Embryos: What Are They and How Should the Law Treat Them?*, 38 CLEV. ST. L. REV. 585 (1990) (claiming that the Supreme Court has refused to interpret "person" in the Fourteenth Amendment as encompassing the unborn); Marcia Joy Wurmbbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079 (1986) (discussing how the prevailing legal view is that neither fetuses nor embryos are persons within the meaning of the Fourteenth Amendment). But see Patricia A. King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1687 (1976) (criticizing the Supreme Court for its opinion in *Roe*, which held that a fetus is not a constitutionally-protected "person"). King argues that viability, not personhood, determines one's status for legal protection, and that unborn viable fetuses merit all legal protections afforded to human beings. *Id.* at 1648, 1672, 1687. She asserts that this change would present "no serious legal problems," and that human status should be determined not by birth, but rather by the capacity for independent existence. *Id.* at 1687.

175. "No member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring).

Fourteenth Amendment, equal protection and due process are afforded only to "persons born or naturalized in the United States."¹⁷⁶ The common law definition of homicide historically has not included the unlawful killing of a fetus.¹⁷⁷ Inheritance laws generally recognize only those people who are born.¹⁷⁸ Finally, the Tennessee Wrongful Death Statute¹⁷⁹ requires the live birth of a fetus to sustain a wrongful death action; otherwise, a viable fetus is not a "person" protected by the statute.¹⁸⁰ Both Justice Blackmun in *Roe* and Justice O'Connor in *Casey* concluded that the state's interest in protecting potential life begins at fetal viability—the time at which a fetus technically could survive independent of the mother's womb.¹⁸¹ Yet, an increasing state interest in the potential life of the fetus does not automatically make the fetus a person. The Tennessee Criminal Abortion Statute utilizes the trimester approach introduced by *Roe*,¹⁸² "[b]ut, even after viability, [fetuses] are not given legal status equivalent to that of a person already born."¹⁸³

Roe and *Casey* undoubtedly fuel an ever-strengthening debate over the extent of fetal rights. The law once considered the fetus "an entity independent from the pregnant woman with interests that are potentially hostile to hers."¹⁸⁴ Today, abortion cases and other statutes come dangerously close to affording the fetus the same legal

176. U.S. CONST. amend. XIV.

177. *Commonwealth v. Cass*, 467 N.E.2d 1324, 1328 (Mass. 1984) (noting that "[s]ince at least the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide."). The Massachusetts court was the first, and thus far only, court to break the common law tradition when it held that viable fetuses were included within the term "person" for purposes of the state's vehicular homicide statute. *Id.* at 1330. In contrast, the California murder statute is one example of many statutes that distinguishes murder of a *human being* from murder of a *fetus*. CAL. PENAL CODE § 187 (West 1986) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.").

178. GROBSTEIN, *supra* note 171, at 121. For a description of exceptions to this general rule, see generally Johnsen, *supra* note 27, at 601 (citing decisions of 19th century cases which had granted the fetus personhood for purposes of inheritance, provided it was ultimately born alive).

179. TENN. CODE ANN. § 20-5-106 (1991).

180. *See Davis v. Davis*, C/A No. 180, 1990 Tenn. App. LEXIS 642, at *7 (Tenn. Ct. App. Sept. 13, 1990) (holding a viable fetus is not invested with legal rights until it is born).

181. *See Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (establishing that the "compelling" point for a state's "important and legitimate interest in potential life" is at viability, at which point the fetus "presumably has the capacity of meaningful life outside the mother's womb"); *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2816 (1992) (stating that before viability, a state's interests are not strong enough to support a prohibition of abortion, or the imposition of significant obstacles to a woman's right to choose the procedure).

182. *See TENN. CODE ANN.* § 39-15-201 (1991) (fixing the first three months of pregnancy as the time period prior to fetal viability).

183. *Davis v. Davis*, C/A No. 180, 1990 Tenn. App. LEXIS 642, at *8 (Tenn. Ct. App. Sept. 13, 1990).

184. Johnsen, *supra* note 27, at 599 (discussing the historical treatment of fetal rights).

status as a born person.¹⁸⁵ As a result, the expansion of fetal rights ignores "far-reaching implications for women as the bearers of fetuses."¹⁸⁶ The assignment of legal status to an embryo or fetus is further complicated by the interactive relationship between the mother and the embryo or fetus. Dr. Clifford Grobstein calls it "a relationship that is so close, intimate, and mutually dependent that it can be called symbiotic[,] and has often been compared with parasitism."¹⁸⁷

Fetal rights further ignore a woman's bodily integrity,¹⁸⁸ enlarge the conflict between mother and fetus,¹⁸⁹ and provide courts with a rationalization for restricting women's rights more severely.¹⁹⁰ Yet, the Fourteenth Amendment encourages equal protection of persons.¹⁹¹ How can laws be equitable that favor a fetus, which is not a person, over a woman, who is a person, to the woman's detriment? "[T]he embryo and mother are so intimately interrelated that the status of one necessarily impinges on that of the other. The relationship, however, does not involve equal status. The mother is a fully established person with strongly defined rights, while the embryo is rudimentary, both in function and status."¹⁹²

B. Viability as a Status Marker

One may argue that *Davis* does not apply to abortion cases, because the state's interest in protecting potential life does not become

185. See generally Dawn E. Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. PA. L. REV. 179 (1989) (considering the attendant problems potentially experienced by women if fetuses are afforded the legal status and rights of personhood). The far-reaching notion that fetuses are persons under the law may result in criminal prosecution of a woman for harming a fetus while she is pregnant because, for example, she did not follow doctor's orders, had a car accident while driving under the influence of alcohol, or committed prenatal child abuse through drug use. *Id.* at 180. Tort actions for prenatal injuries may also be charged against pregnant women as a "social penalty" for undermining the interests of the fetus. *Id.* These legal remedies allow the government to dictate how pregnant women should conduct themselves if their behavior is deemed antithetic to fetal rights. *Id.*

186. Johnsen, *supra* note 27, at 600.

187. GROBSTEIN, *supra* note 171, at 86 (noting that the mother becomes a temporary biological host to her developing offspring).

188. See Johnsen, *supra* note 27, at 614 (discussing the infringement on women's liberty and privacy interests that results from vesting fetuses with expanded constitutional protection). The woman's right to privacy "is particularly important when the state intervention involves a physical intrusion on an individual's body." *Id.*

189. See Johnsen, *supra* note 27, at 605 (commenting on how fetal rights have been used to the detriment of pregnant women's autonomy).

190. See Johnsen, *supra* note 27, at 600.

191. U.S. CONST. amend. XIV, § 1.

192. GROBSTEIN, *supra* note 171, at 139.

compelling until the fetus reaches viability,¹⁹³ and thus a woman is free to seek an abortion before fetal viability. Because viability is the critical point in deciding abortion cases according to both *Roe* and *Casey*,¹⁹⁴ any case dealing with preembryos would fall short of this distinction because viability supposedly has not been reached. In addition, the Tennessee Supreme Court was not ruling on abortion in *Davis*.¹⁹⁵ The court felt comfortable ruling on this matter because the preembryonic stage of development is far removed from fetal development.¹⁹⁶

The purpose of this article, however, is not to prove that the *Davis* holding must apply to abortion cases, only that it should. The court's overwhelming respect for a person's right to choose whether or not to procreate in *Davis* is refreshing. The decision captures the essence of the abortion debate and overshadows confusing, constantly shifting scientific distinctions between stages of development. Both viable fetuses and preembryos have the potential to become children, so how can the state's interest in protecting potential life be defined differently for abortion cases than for artificial insemination cases? Furthermore, the issue of "whether the parties will become parents,"¹⁹⁷ the essential dispute in *Davis*,¹⁹⁸ is a question that a woman seeking an abortion in a state with restrictive abortion laws often faces.

The viability framework does not account for the fact that advancing medical technology is moving the line of viability closer to conception with each new discovery.¹⁹⁹ One commentator argues that because the frozen fertilized embryo can be sustained while outside the mother's body, it is viable.²⁰⁰ This same commentator

193. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2816 (1992) (recognizing viability as the point at which state regulation of abortion becomes constitutional given important and legitimate state objectives); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring); *Roe v. Wade*, 410 U.S. 113, 163 (1973).

194. See *supra* note 193 and accompanying text.

195. 842 S.W.2d 588 (Tenn. 1992) (stating that an inquiry into the legal status of preembryos is outside the context of the abortion debate).

196. See *id.* at 596 (maintaining that a preembryo "should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential").

197. *Id.* at 598.

198. *Id.*

199. See generally Henry J. Hyde, *The Human Life Bill: Some Issues and Answers*, 27 N.Y.L. SCH. L. REV. 1077 (1982) (commenting on controversial proposed legislation which attempts to grant Congress the power to determine when a human being's life begins); David Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J.L. & MED. 97 (1982) (discussing proposed legislation which would grant fetuses civil rights and create "fetal personhood" for the unborn at every stage of their biological development).

200. See Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 514 (1990) (citing *Roe v. Wade*'s definition of viability as the time when a fetus is "potentially

further suggests that medical technology is advancing so quickly that, in the future, fertilized ova may be sustained outside the mother's body at all stages of development.²⁰¹

Therefore, viability, the cornerstone of both *Roe* and *Casey*, may prove disastrous to women's privacy rights in the future. In light of the aforementioned scientific advances, if the state's interest in protecting potential life suddenly becomes compelling and legitimate at viability, there potentially may be no point during pregnancy at which states' interests will be deemed less important than a woman's reproductive freedom.

Viability is an uncertain line; it is different for each fetus.²⁰² How can a court determine this line? When does abortion stop being a woman's decision about what to do with her own body, and start to become a barrier to the state's interest in protecting the potential future life inside the mother? The "potential for life" for an unborn human does not come magically into being at viability.²⁰³ The state's concerns over the health of the fetus do not explode into existence at the point of viability.²⁰⁴ For this reason, at least one scholar argues that in the fetal rights context, "viability is a meaningless distinction" and the state's interest in protecting the health of the fetus is "illegitimate."²⁰⁵ In the abortion context, viability is an arbitrary marker—a convenient legal compromise balancing the Court's slavish adherence to the *Roe* precedent with the anti-abortion fervor purportedly sweeping the nation.

Application of *Davis* would make the distinction between preembryos and fetuses irrelevant in the abortion debate, because abortion would be perceived as a personal choice, rather than as an act aimed at frustrating state interests. Mr. Davis wanted the embryos destroyed because, otherwise, his "reproductive rights" would be violated and

able to live outside the mother's womb albeit with artificial aide").

201. *Id.* at 514-15 & n.55 (discussing how advancement of the cryopreservation procedure will create legal ramifications and alterations of the 1973 *Roe* trimester framework).

202. *Id.* at 527 (reviewing the contradictory testimony of five expert witnesses on the meaning and nature of viability).

203. See Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1997 (1985) (defining viability as the theoretical ability to live independent from the mother and noting that this definition is deceptive because it relies on social and legal bases, as opposed to a purely biological classification).

204. See Johnsen, *supra* note 27, at 618-20; Johnsen, *supra* note 185, at 190-92 (reviewing the ways in which states' restrictions infringe on the rights of pregnant women throughout the course of their entire pregnancies, not just once viability occurs).

205. Johnsen, *supra* note 27, at 619-20 & n.82 (arguing that the viability distinction is a way to control women's choices by creating an arbitrary point at which state restrictions apply).

"unwanted parenthood" would be forced upon him.²⁰⁶ Is it likely that Mr. Davis would have changed his mind after the divorce, when the embryo became a "viable" fetus in either Mrs. Davis' womb or in a donee's womb? His predicament would remain the same, and his decision would also remain private and personal. Women's choices about abortion are no different. The law must give women equal treatment in this matter.

C. *The Beginning of Parenthood*

If the distinction between preembryos and embryos was not important in deciding *Davis*,²⁰⁷ then courts should not hesitate to consider *Davis* when deciding abortion cases. In spite of the fact that the embryos remain in a petri dish, they are fertilized with male sperm and merely await implantation in the female uterus.²⁰⁸ They thus arguably resemble the fertilized egg already implanted. Genetic consequences are dictated at fertilization whether or not the egg has been implanted and the woman is pregnant.²⁰⁹ Thus, each of these situations triggers identical parental decisions regarding procreation.

One commentator argues that frozen embryos have nothing to do with abortion, because with frozen embryos, no one is "pregnant."²¹⁰ In fact, the Tennessee Court of Appeals justified its reversal of the trial court's decision in *Davis* based in part on the fact that no one was pregnant.²¹¹ The appellate judges reasoned that there was no justification to order implantation against the will of both parties.²¹² However, the Tennessee Supreme Court's decision was based firmly on the right to avoid procreation.²¹³ Most procreational decisions usually are made prior to pregnancy, and thus have little relevance

206. See *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *59 (Blount County Cir. Ct. Tenn. Sept. 21, 1989).

207. See *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992) (commenting that this distinction is not dispositive but must be understood in relation to the trial court's analysis and its misguided conclusions on the issue of when life begins).

208. See *Davis*, *supra* note 200, at 508-09.

209. See *Davis*, 842 S.W.2d at 593-94 (referring to a doctor's testimony which concluded that fourteen days after the merger of sperm and egg, an embryo's cellular development and genetic composition are determined fully).

210. See *Davis*, *supra* note 200, at 514 (differentiating the *Roe* and *Webster* decisions from the *Davis* facts because frozen embryos are outside a woman's body, thus negating the privacy interest asserted in the current abortion case law).

211. See *Davis*, 842 S.W.2d at 589 (concluding that without an actual pregnancy, the parties share an equal interest in the ova).

212. See *Davis v. Davis*, C/A No. 180, 1990 Tenn. App. LEXIS 642, at *6 (Tenn. Ct. App. Sept. 13, 1990) (discussing how implantation against Mr. Davis' will constituted violative state action). Mrs. Davis, who had since remarried, wanted to donate the embryos to a childless couple rather than implant them in her own uterus. *Id.*

213. See *Davis*, 842 S.W.2d at 601 (reviewing the case law which established procreational autonomy and parental rights as fundamental guarantees of ordered liberty).

within the abortion context.²¹⁴ Such decisions are made each time a couple chooses to abstain from sexual intercourse or to use contraceptives; each time a couple tries to conceive; and each time a woman chooses abortion in the event of an unwanted pregnancy.

Some may argue that *Davis* should not be applied to abortion cases, because the court specifically narrowed the potential parenthood issue to that of "genetic parenthood."²¹⁵ One commentator points out a flaw in this aspect of the court's reasoning: if the issue is solely one of genetics, how can the court justify its reliance on "all other aspects of parenthood?"²¹⁶ Mr. Davis did not want to become a parent against his will simply because he was tied genetically to the frozen embryos—he did not want to be forced into parenthood because he would be tied to them as any potential father would be to an unborn child.²¹⁷ In contrast, women's choices about abortion affect all stages of potential parenthood—genetic, gestation, child-bearing, and child-rearing—much more than in Mr. Davis' case.²¹⁸

Adopting the reasoning employed in *Davis* achieves a succinct separation between law and morality: drawing a clear line between, on the one hand, the fundamental privacy right of a woman making one of the most important, painful decisions of her life and, on the other, legitimate government intrusion upon her personal life and

214. *Id.* at 602.

215. *Id.* at 603 (upholding the uniqueness of the interest identified in the case, and its limited applicability to other cases).

216. See Harris, *supra* note 109, at 404 (finding an inconsistency in limiting the *Davis* decision to only IVF cases, when the court included in its analysis other aspects of parenthood which fit into the context of the abortion debate). But see *Davis*, 842 S.W.2d at 603 (describing the four aspects of parenthood, but limiting the issue solely to genetics for purposes of the court's legal analysis).

217. The decision in *Davis* did not even consider the possibility that Mr. Davis, by virtue of being male, might have been subjected to laws that deny paternal rights to sperm donors if the embryos had been donated. See Note, *supra* note 2, at 1535-37 (rejecting genetic ties as a basis for parental rights, and emphasizing the existence of a parent-child emotional relationship as a basis for determining public policy).

218. See *Davis*, 842 S.W.2d at 603 (describing the stages of parenthood in detail). The court stated:

[t]he unique nature of this case requires us to note that the interests of these parties in parenthood are different in scope than the parental interest considered in other cases. Previously, courts have dealt with the childbearing and child-rearing aspects of parenthood. Abortion cases have dealt with gestational parenthood. In this case, the Court must deal with the question of genetic parenthood. We conclude, moreover, that an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood. The technological fact that someone unknown to these parties could gestate these preembryos does not alter the fact that these parties, the gamete-providers, would become parents in that event, at least in the genetic sense. The profound impact this would have on them supports their right to sole decisional authority as to whether the process of attempting to gestate these preembryos should continue.

Id. at 602-03.

decisions. Within this approach, problems inherent in determining the timing of viability disappear. The woman is empowered to weigh the morality and consequences of abortion for herself. Freedom of speech guarantees that she will hear all sides of the debate over the "right" and "wrong" of abortion. "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."²¹⁹ Just as the *Davis* decision preserved Junior Davis' right not to procreate, a woman's right not to procreate—whether through use of abortion or other means—must be equally protected.

D. Gender Inequality in Abortion Laws

A final reason it is imperative that the Supreme Court apply *Davis* to abortion cases is the sexual discrimination that results by not doing so. When reading *Davis* alongside *Casey*, how can a reasonable court not recognize a difference in reasoning based primarily on gender? Laurence Tribe recognized the fundamental sexual discrimination inherent in abortion restrictions:

[Although] current law nowhere forces *men* to sacrifice their bodies and restructure their lives even in those tragic situations (of needed organ transplants, for example) where nothing less will permit their children to survive, those who would outlaw abortion [would] rely [on] economic and physiological circumstances—the supposed dictates of the natural—to conscript women [as] involuntary incubators and thus to usurp a control over sexual activity and its consequences that men [take] for granted.²²⁰

Recognizing this difference makes it unnecessary for the Court to consider the moral ramifications of abortion, and leaves the decision to the individual. "There have been few attempts at state intrusion of the magnitude and sweeping nature involved in state regulation of pregnant women's actions."²²¹ At least one commentator goes so far as to assert that if men could get pregnant, abortion would be an unquestionable right.²²²

219. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2807 (1992).

220. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 243 (1985); see also Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-49, 55-59 (1971) (comparing restrictions placed on a woman's right to abort to the idea of forcing a healthy individual—through medical advances which make it possible for a patient to "hook into" that individual's well-functioning circulatory system—to save the life of another person). Thomson argues that the "right to life" of the unborn does not extend as far as infringing upon another's rights to bodily integrity and privacy in various medical contexts, including that of abortion. *Id.*

221. Johnsen, *supra* note 27, at 615.

222. See Smothers, *supra* note 109, at A1 (commenting on the differential treatment of men's and women's procreational autonomy).

In response to this unequal treatment, women could attempt to invoke Fourteenth Amendment equal protection guarantees against sexual discrimination in the abortion context.²²³ When two classes of people are treated in a disparate manner by the law, the disadvantaged class may attempt to convince a court to engage in strict scrutiny of that law.²²⁴

Heightened equal protection scrutiny²²⁵ by the courts is desirable in the abortion context for three reasons. First, in spite of judicial precedence to the contrary,²²⁶ women arguably comprise a "suspect class" in the instant circumstances. Only women suffer from abortion restrictions, because only women become pregnant and have abortions.²²⁷ Fortunately, becoming pregnant can be a choice; but some pregnancies are unforeseen and completely accidental, regardless of what precautions may have been taken. Women can avoid getting pregnant with certainty by avoiding heterosexual intercourse altogether; however, that arguably requires extraordinary self-denial, and it does not rule out pregnancy as a result of rape.

Unequal treatment of men and women in the abortion context is due to reproductive differences. Abortion laws are not intended to discriminate on the basis of gender; however, they do single out pregnant people, and "[t]he ability to bear children is to sex discrimination what dark skin is to race discrimination"—an immuta-

223. See Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 608-19 (1993) (arguing that the Equal Protection Clause of the Fourteenth Amendment is a more appropriate and secure means of preventing sex and pregnancy discrimination than the traditional privacy-based analysis of reproductive freedom).

224. A state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

225. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (upholding that laws discriminating on the basis of gender must survive "intermediate scrutiny" by the courts). "[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.*; see also *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (requiring the application of strict scrutiny where a classification based on gender was the basis for differential treatment).

226. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding, as constitutional under the Equal Protection Clause, a program that prevented women with "normal" pregnancies—i.e., those without health complications—from receiving disability benefits); *Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544 (W.D. Mich. 1994) (holding that pregnant women are not a "suspect class" for purposes of an equal protection analysis). But see *Harris v. Forklift Sys. Inc.*, 114 S. Ct. 367, 373 n.* (1993) (Ginsburg, J., concurring) (asserting that "it remains an open question whether 'classifications based upon gender are inherently suspect'" (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

227. Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1631 (1979) (constructing an equal protection argument that claims prohibiting abortions forces women to act as "good samaritans" and perform a "rescue" of the fetus, even when there is no legal duty to rescue in other situations).

ble characteristic.²²⁸ However, *Davis* was a unique case because for the first time, the unborn was out of the womb and was as much a part of the father's body as the mother's.²²⁹ The court did not hesitate to address the man's complaints concerning a potentially intrusive, unwanted fatherhood.²³⁰

A second reason why equal protection is triggered in the abortion context is that laws regulating abortion treat women differently than men.²³¹ The state exerts control over a pregnant woman's bodily privacy in such a manner as never could be done to a man.²³²

Third, the history of discrimination against women in this country²³³ provides a stark reminder that intrusions upon a woman's bodily integrity have been, and continue to be, ingrained in U.S. law. Such historically accepted intrusions are not erased easily. In addition, "the women who suffer most from prohibitions on abortion are likely to be the same women who have suffered most from other sorts of discrimination or injustice"—poor women and career women.²³⁴

The court's reasoning in *Davis* equalizes, rather than divides, the gender difference in the abortion context. However, *Davis* must not lead to a preference of male rights over female rights when the woman desires to continue the pregnancy and the man prefers an abortion.²³⁵ The Tennessee Supreme Court in *Davis* judged the two gamete-providers equally important in deciding which party would decide the fate of the frozen embryos.²³⁶ This is why the balancing

228. Johnsen, *supra* note 27, at 622 (arguing that immutable characteristics distinguish the advantaged from the disadvantaged and, in the case of gender, are used to justify a system of male dominance).

229. *Davis v. Davis*, C/A No. 180, 1990 Tenn. App. LEXIS 642, at *58-60 (Tenn. Ct. App. Sept. 13, 1990).

230. See *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (recognizing that Mr. Davis would suffer inordinately by being forced to become the biological father of a child with whom he might not have an opportunity to develop a relationship).

231. Clearly, because men physically cannot become pregnant, they are neither affected in the same way, nor to the same degree, by laws that impose limits on a woman's right to an abortion.

232. The state, for instance, may find that, at viability, its interest in protecting potential life outweighs the mother's privacy interest; yet a man would never have to face such a situation. Likewise, a teenage boy will never be faced with the ordeal of securing parental consent to obtain an abortion, whereas under *Casey* pregnant teenage girls would.

233. See Regan, *supra* note 227, at 1632 (arguing that discrimination is a contributing factor in the application of heightened equal protection scrutiny to abortion laws).

234. Regan, *supra* note 227, at 1632 (hypothesizing that these two groups of women have probably suffered more injustices than married women who tend to focus primarily on their families).

235. See Harris, *supra* note 109, at 407 (describing this scenario); see also Smothers, *supra* note 109, at A1 (observing that courts are now willing to compel a woman to have a child but have decided a man cannot be forced to be a father).

236. *Davis v. Davis*, 842 S.W.2d 588, 597, 601 (Tenn. 1992).

test was applied to the issue.²³⁷ The court also judged the right to procreate and the right to prevent procreation equal.²³⁸ "Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question."²³⁹ At this point in history, male dominance over personal abortion decisions is an unlikely outcome of U.S. jurisprudence. The Supreme Court dislikes spousal consent laws that inconvenience abortion, and has not hesitated to strike them down, even in *Casey*.²⁴⁰

Davis fits nicely into the abortion context as a long-lost recognition of a woman's right not to procreate, upholding the proper level of heightened respect for women's rights to bodily privacy. The court in *Davis* was able to draw an equal framework of procreational rights simply because the other right implicated by abortion decisions—the right to control one's own body—was not at stake.²⁴¹ The object of debate was in a neutral petri dish.²⁴² That is why the man's interest in *Davis* was given equal treatment. Otherwise, "a woman's *stronger*, competing interest in controlling her body"²⁴³ should overshadow procreational autonomy. *Davis* simply strengthens the importance of the right not to procreate.

Interestingly, IVF and the subsequent destruction of embryos is technically the only way that a man could "have an abortion." Legally he cannot order his pregnant spouse or girlfriend to abort his child in exercise of his right to prevent procreation, because that is a choice deeply affecting the woman's own body.²⁴⁴ However, because cryopreserved fertilized embryos lie in a petri dish until implantation

237. See *id.* at 601 (noting that men's and women's reproductive freedom are of equal importance, especially in the IVF process).

238. *Id.*

239. *Id.* at 604.

240. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2826-31 (1992) (holding a husband's interest in the fetus' potential life does not grant him authority over his wife); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67-71 (1976) (concluding that the state does not have the constitutional authority to give the spouse unilateral power to prohibit his wife from obtaining an abortion). For other courts' treatment of spousal consent requirements, see also *Poe v. Gerstein*, 517 F.2d 787, 794-96 (5th Cir. 1975) (deciding the spouse's interest in the fetus does not outweigh the woman's fundamental rights); *Wolfe v. Schroering*, 388 F. Supp. 631, 636-37 (W.D. Ky. 1974) (stressing that, because the state cannot itself interfere to protect the fetus before viability, it cannot intercede on a husband's behalf either); *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973) (holding two statutes invalid that required a woman seeking an abortion to obtain third party consent).

241. *Davis*, 842 S.W.2d at 601 (discussing how concerns about a woman's bodily integrity that usually preclude men from abortion decisions are not applicable in the context of IVF).

242. *Id.* at 591.

243. Note, *supra* note 2, at 1544-45 (emphasis added); see also *Danforth*, 428 U.S. at 69-75 (upholding a woman's right to have an abortion free from spousal interference).

244. See *Danforth*, 428 U.S. at 70.

in the woman's womb,²⁴⁵ a man can choose to destroy them just as a woman may choose to have an abortion. The court in *Davis* stated that in IVF, "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here."²⁴⁶ Does that not mean that in abortion cases, the woman should be afforded even higher procreational autonomy, because her bodily integrity is at stake?²⁴⁷

One commentator has insisted that "[t]he rationales of *Roe v. Wade* and *Webster* [do] not apply to an analysis of the status of a frozen embryo because the embryo is outside the woman's body and does not interfere with her right of privacy."²⁴⁸ On the contrary, both *Davis* and the abortion cases implicate the right to privacy as embodied in the right to procreational autonomy, which is unrelated to whether the egg is growing in the woman's body, or preserved in a petri dish. Potential life is potential life; the decision to become a parent resides with both parents, or at least with the mother contemplating abortion.

V. CONCLUSION

The state's interest in protecting potential life is important, but not sufficiently compelling, in abortion decisions.²⁴⁹ There is an inherent conflict between a woman's fundamental right to be free from state-mandated "serious physical invasion," and the movement to endow the fetus with legal rights similar to those enjoyed by born persons.²⁵⁰ Recognizing a fundamental right not to procreate does not mean necessarily that all pregnant women will rush out and exercise their newly-clarified right by obtaining an abortion. By the same token, neither does stripping a woman of her right to have an abortion mean that abortion will disappear completely or no longer serve as an alternative to contraception.²⁵¹

245. *Davis*, 842 S.W.2d at 591.

246. *Id.* at 601.

247. See generally *Danforth*, 428 U.S. at 52 (discussing the competing interests of men and women concerning the issue of spousal consent forms).

248. *Davis*, *supra* note 200, at 514.

249. Regan, *supra* note 227, at 1634-35 (arguing that the primary justification for laws regulating abortion is the protection of potential human life, which nonetheless cannot compare with a woman's interest in non-subordination and freedom from physical invasion).

250. Regan, *supra* note 227, at 1635 (discussing the "inequality between pregnant women and the treatment of other potential [good] samaritans who are not required to undertake burdens[,] and how this inequality disadvantages a class that has long suffered a history of discrimination).

251. See generally Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1 (1990); Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist*

Why do courts attempt to differentiate a woman's right to choose abortion based upon different stages of fetal embryonic development when various scientific findings indicate different stages at which "life begins"? Four different experts testified at the *Davis* trial, presenting four different opinions on the point at which life begins, all scientifically supported. Many argue that the difference between preembryos, embryos, and fetuses should control in abortion cases. But these arguments are so muddled that they blur the reality of the law: no "person" is protected by the law until they are born, except in recent abortion cases.²⁵²

Who can dispute that at a very early stage, genetics dictate what characteristics a baby will display once it is born? Who can dispute that by a certain stage during pregnancy, a fetus could survive outside its mother's uterus with the aid of technological machinery? But why should these possibilities preempt a woman's fundamental, constitutional right to procreate—or not?

Use of the Tennessee Supreme Court's analysis in *Davis* of a person's right not to procreate within the abortion context underscores the reality that it is the person who is relevant in law, not some amorphous concept of life. Life surrounds all "persons" on a daily basis, but at times the quality of that life is paid no more respect than if it were a fly squashed by a newspaper. It is imperative that the law not confuse the issues: "viable fetuses in the womb are not entitled to the same protection as 'persons'."²⁵³

Countries, 40 STAN. L. REV. 1027 (1988); Brian J. Leslie, Note, *Poland, Abortion, and the Roman Catholic Church*, 17 B.C. INT'L & COMP. L. REV. 453 (1994). As the above-cited articles discuss, high numbers of abortions are nevertheless performed in countries where abortion is illegal, as women seek to terminate unwanted pregnancies regardless of the consequences.

252. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2818 (1992) (rejecting the trimester framework of *Roe* as undervaluing the state's interest in potential life and concentrating on the rights of the fetus). *Casey* is an example of a recent abortion case that illustrates the Court's increased discussion of the fetus' rights, as compared with its limited discussion of fetal rights in older cases, such as *Roe*.

253. *Davis v. Davis*, C/A No. 180, 1990 Tenn. App. LEXIS 642, at *7 (Tenn. Ct. App. Sept. 13, 1990).

